United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1039

76-1039

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P/S

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 76-1039

UNITED STATES OF AMERICA

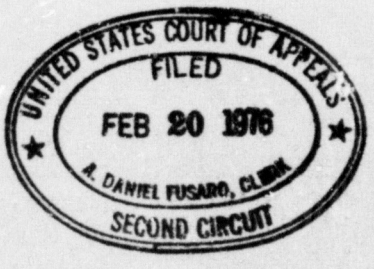
-against-

CARLOS VALLE,

Defendant-Appellant.

On Appeal From The United States
District Court For The
Southern District of New York

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

-against- :

76-1039

CARLOS VALLE, :

Defendant-Appellant. :

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BRIEF FOR THE APPELLANT

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Defendant-Appellant :

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BRIEF FOR THE APPELLANT

QUESTIONS PRESENTED

1. Whether the District Court erred in admitting into evidence statements by the defendant indicating his support for the activities of a Puerto Rican nationalist political organization.

2. Whether the District Court erred in its refusal to grant a mistrial rather than merely striking the testimony of the witness Lometti.

3. Whether the District Court erred to Appellant's prejudice in gratuitously informing the jury of the legality of procuring certain statements made by the defendant and admitted against him.

STATEMENT OF THE CASE

Appellant Carlos Valle appeals from his conviction before Hon. Milton Pollack, United States District Judge, and a jury convicting him of violating 18 U.S.C. §871 [1] by knowingly and willfully making a threat to take the life of the President of the United States.

Officer Mario A. Buda of the New York City Police Department testified that while he was employed in the Communications Division Tape Room at Police Headquarters on August 17, 1975, a telephone call was received over the 911 emergency number and, as were all 911 calls (Tr. 4-5), the communication was tape recorded (Tr. 9). The call in question was extracted from the master tape reel by Officer Buda and transferred to a cassette reel on October 15th, 1975. (G. Ex. 1, Tr. 9)[2]

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[1] §871. Threats against President and successors to the Presidency. (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly or willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] The conversation comprising the call in question is reproduced in full as an addendum to the Brief. (G. Ex. 4, Tr. 15).

William V. Lometti, a special agent with the United States Secret Service, who testified that he first met the Appellant in April, 1973, identified Appellant in the courtroom (Tr. 12). He also testified that he had spoken with Appellant for about an hour as recently as April of 1975 (Tr. 13). While Lometti was on the stand, the prosecution played Government's Exhibit 1, the tape of the incoming telephone call allegedly made by Appellant. Agent Lometti opined that the voice on the recording was that of Appellant (Tr. 16). Lometti also testified that prior to trial, on November 26, 1975, while present at the Office of the United States Attorney for the Southern District of New York, he identified the voice of the Appellant from a recording termed a "voice lineup" containing six male Spanish voices (Tr. 17-18). Each voice on the tape, testified Lometti, spoke the same phrase (Tr. 18). Lometti stated that he had correctly chosen the first voice on the tape as that of Appellant (Tr. 19).

At the conclusion of Lometti's direct testimony, Appellant moved to have Government's Exhibit 5, the "voice lineup" played for the jury. The Government did not object (Tr. 19). However, due to a malfunction, the tape could not be played and the jury was instructed that they should "consider whatever the witness [Lometti] has told you thus far only provisionally" (Tr. 24) and that his testimony was "subject to a motion to expunge it from the record...." (Tr. 25). Appellant

had objected to permitting Lometti's testimony to sit with the jury. (Tr. 23).

Agent Lon Warfield of the Secret Service, the prosecution's last witness, then took the stand. He testified that he had arrested the Appellant and identified him in the courtroom (Tr. 26). Immediately following Appellant's arrest, Appellant was taken to the Secret Service Headquarters at the World Trade Center. There Appellant signed a waiver of rights form and was interviewed by agents of the Secret Service (Tr. 27-28). Warfield testified that Appellant impliedly admitted making the call in question when he stated to the agents in the course of the interview that "if he were released he [Valle] didn't think that there would be any more phone calls made." (Tr. 29)

Warfield also testified that,

> ...later in the interview we got onto the subject of the FALN, which is a radical Puerto Rican organization which supports the Puerto Rican independence. It's a Puerto Rican nationalist group. He said that although he had not been involved in any of their terrorist activities, that he did in fact support their activities. He considered it almost a form of war, warfare, that any terrorist activities that they were engaged in he said he strongly supported...He said that if the FALN wanted--I'm sorry, he said that if the FALN thought it would help their cause for the President to be killed and wanted him to do it, that he would in fact do it.

Q: Was anything further said by either you or Mr. Valle?

Yes, I asked him, the defendant, if he personally thought that it would help the cause of the FALN if he did kill the President, and he said "yes, it would."
(Tr. 29-30)

Appellant's motion for a mistrial on the basis of the admission of Agent Warfield's testimony regarding Appellant's alleged adherence to the purported political aims of the FALN was overruled (Tr 30). The waiver of rights form signed by Appellant was admitted into evidence without objection (Tr. 31).[3/]

On cross examination, Agent Warfield stated that the waiver form signed by Appellant contained two parts--a warning of rights which Appellant had signed, and a waiver of rights which Appellant had refused to sign (Tr. 33-34). Despite Appellant's refusal to sign the waiver, Warfield conceded that Appellant was interrogated (Tr. 34).

At the conclusion of Agent Warfield's testimony, Appellant renewed his motion for a mistrial based upon the admission of testimony that Appellant had stated that he approved of the FALN's terrorist activities. The court adhered to its ruling denying the motion for a mistrial (Tr. 44-45).

[3/] A pre-trial motion to suppress Appellant's statements had been denied. (A. 1)

On the following day, the prosecution informed the Court that the "voice lineup" tape had been destroyed (Tr. 47). The Court granted Appellant's motion to strike the entirety of Agent Lometti's testimony but denied Appellant's motion for a mistrial. (Tr. 48)

The Government then played for the jury the three other tapes that it had offered into evidence (Tr. 51): the original call (A. Ex. 1); a voice exemplar of Appellant (A. Ex. 2); and a composite tape made of those two tapes (A. Ex. 3), the admissibility of which had been stipulated to by the defense (Tr. 14). The Government then rested (Tr. 52).

Appellant then moved to dismiss on the basis of an absence of any sufficient identification evidence of Appellant which motion was denied (Tr. 52).

The defense offered two exhibits by stipulation, a personal history sheet of Appellant and a stipulation reciting, inter alia, that Appellant was not listed on any known list of members of the Communist Party (Tr. 54). The defense then rested (Tr. 55)

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN ADMITTING APPELLANT'S STATEMENT REGARDING "FALN"

A. The Elements of the Offense

It is settled in this Circuit that it is unnecessary in a prosecution under 18 U.S.C. §871 for the Government to prove that the defendant had an actual intent to carry out his threat. United States v. Compton, 428 F.2d 18, 21 (2d Cir. 1970). 4/ But see, Watts v. United States, 394 U.S. 705, 707 - 708 (1969). Under the interpretation given to the statute, it is sufficient

> ...if the jury could properly find that the statements made by appellant would be interpreted by reasonable men "as a serious expression of an intention to inflict bodily harm upon or to take the life of the President" and that the statements were not the result of mistake, duress or coercion.
>
> United States v. Compton, supra, at 22, citing Roy v. United States, 416 F.2d 877, 878 (9th Cir. 1969)

Thus, while specific intent to carry out the threat is unnecessary, the prosecution must prove willfulness with respect to the defendant's intention to communicate a threat. See, e.g. Compton, supra, at 22 n.10.

4/ See also, Rogers v. United States, __ U.S.__, 45 L.Ed.2d 1, 95 S.Ct. 2091, 2096 (1975) (Marshall and Douglas, concurring).

B. The FALN Statements were Inadmissible

In an effort to discharge its burden with respect to the requisite element of willfulness, the Government, over objection, was permitted to introduce into evidence statements made by Appellant regarding his alleged sympathies with a Puerto Rican nationalist group popularly known by the acronym "FALN." 5/ The trial court justified the admissibility of these statements as relevant on the question of Appellant's "motive and intent" (Tr. 30). Appellant's motion for a mistrial was denied.

The statements introduced through Agent Warfield were of two types. First, Warfield testified that although Appellant had denied being "involved" in any of FALN's alleged "terrorist activities," he nevertheless "strongly supported" any terrorist activities that they were engaged in (Tr. 30). 6/ Thus the impression was conveyed to the jury that Appellant was a "fellow traveler" of a terrorist Puerto Rican nationalist group. The second form of statement regarded Appellant's alleged belief that it would help the cause of the FALN if

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5/ The District Court was aware of the potential prejudicial effect of reference to FALN and included questions about such prejudice in its voir dire of prospective jurors. Because of the expedited schedule, at the writing of this brief, the transcript of the voir dire is not available and will be supplied as a Supplemental Appendix should the Court so request.

6/ The characterization of the FALN as a terrorist group was not made by Appellant, but rather by Agent Warfield, although Warfield was neither qualified as having any expert knowledge that a group known as FALN actually engaged in terrorist acts nor was any evidence adduced that Appellant had actual knowledge that the FALN engaged in or advocated terrorist acts. Cf. Scales v. United States, 367 U.S. 203, 234 (1961); United States v. Spock, 416 F.2d 165, 173 (1st Cir, 1969).

the President were to be killed by Appellant or, by implication, by anybody else, to which Appellant allegedly answered in the affirmative (Tr. 30).

The prosecution, however, articulated only in the most general way--that is, by merely regurgitating the word "motive" in its summation (Tr. 57)--how Appellant's alleged affinity for the FALN was probative on whether Appellant has made the call, the only issue before the jury. Indeed, in view of the bizarre nature of the call, delivered entirely in the third person, it is clear that the Government attempted to "politicize" Appellant's alleged call and thereby attribute a motive to Appellant when indeed none was necessary under the "objective" 7/ construction of the statute given by this Court in Compton, supra. Compare, United States v. Brown, 511 F.2d 920, 923 (2d Cir. 1975). The effect of the admission of this was to prejudicially cast Appellant in the role of a political radical in the eyes of the jury.

It requires no lengthy citation of authority that had Appellant himself taken the stand in order to testify regarding any political motive for the call, such testimony would have been properly excluded. See, e.g., United States v. Tijerina, 446 F.2d 675 (10th Cir. 1971).

7/ Rogers v. United States, supra.

Cases in which testimony regarding a defendant's political associations have been found to be admissible have been confined to criminal syndicalism or conspiracy prosecutions where it was necessary for the prosecution to show either that the defendant adhered to the illegal, as well as legal, aims of a particular organization, see e.g. United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), or where formal political affiliations among co-conspirators was an actual part of the prosecutorial scheme. In United States v. Hobson, 519 F.2d 765 (9th Cir. 1975), a conspiracy prosecution for harboring a prison escapee and fugitive from justice, the Court found that

> A major part of the government's theory of the conspiracy was that all defendants along with [the escapee] were members of the Venceramos, that the Central Committee dictated the actions of the members who followed order in military fashion, and that... [Hobson] was to help harbour and conceal Beaty [the escapee] on specific Venceramos Central Committee orders.
>
> 519 F.2d at 771.

Under these circumstances, the Court found no error in the admission into evidence of a damaging letter written by Venceramos Central Committee.

By contrast, the FALN statements were wholly irrelevant to the proof needed to be established by the Government to support a conviction, especially since specific intent to carry out a threat is not a necessary element of the offense.

United States v. Collazo, 196 F.2d 573 (D.C.Cir. 1952) points to the necessity for reversal. Collazo was prosecuted as a principal for aiding and abetting one Torresola in the murder of a presidential security guard outside Blair House while President Truman was in residence there. Both Collazo and Torresola were Puerto Ricans. Collazo's defense at trial was that

> ...in proceeding with Torresola to Blair House on November 1st, it was merely to stage a demonstration, albeit one in which they might be killed, which would attract popular attention to conditions in Puerto Rico. Appellant does not contend that his views as to Puerto Rico in and of themselves constituted a defense to the charge of murder. He contends that those views were (1) relevant and material to the issue of his purpose (intent) and (2) materially responsive to the prosecutor's claim of motive, i.e., a reason, for what was done.
> 196 F.2d at 578

It followed, he argued, that an instruction to the jury by the trial court that "the Puerto Rican situation" and the Appellant's views thereon were irrelevant, was error. Id.

The Court of Appeals first observed that unlike the present case "the purpose (intent) which is thus a requisite element of the offense, is a purpose (intent) to kill." Id. It was then noted that

> if a killing is purposed (intended) and none of the established legal excuses for purposed killing is pleaded, the motive of the killer is wholly immaterial.
> Id. (Emphasis Supplied.)

Unlike Collazo, Appellant Valle did not take the stand and place motive in issue.

Since Collazo was prosecuted as an aider and abettor, it was a jury question "whether the purposed killing by Torresola was within the design or plan of the two men." 196 F.2d at 580. According to Collazo, it followed that it became a legitimate line of inquiry for the jury to determine the views of Collazo and Torresola concerning Puerto Rico since those views werewhat prompted their intention to proceed to Blair House. The Court rejected this contention.

> ...if we were required to decide whether their agreement included the probability of killing someone, would information as to Collazo's views on Puerto Rico help us in any manner in answering that question? We are of clear opinion that it would not. Those views did not tend to throw any light on what the two men purposed to do when they did what they actually did. Had the judge left the jury uninstructed on the point, he would have left them to consider motive, a wholly immaterial consideration upon the issues presented in the case.
>
> The jury were not instructed to disregard Collazo's statements on the stand as to the alleged limited purpose of the demonstration. He was properly allowed to testify as to his own intent. What was excluded from consideration of the jury was the prolonged collateral testimony concerning Puerto Rico.
>
> It seems to us, as it did to the trial court, that the views of the two confederates concerning Puerto Rico were irrelevant or immaterial, or both, to the issue whether their contemplated demonstration did or did not include a purposed or intended killing. To have let the jury speculate, without instruction, on the

> applicability and effect of that evidence would have been an erroneous neglect by the judge of his duty to instruct upon such matters as matters of law.
>
> In respect to appellant's contention that the evidence as to Puerto Rico was responsive to the prosecutor's claim of a motive shown by that same evidence, it is enough to say that the trial judge excluded that evidence entirely, for all purposes, those of the prosecutor as well as those of the defense. The prosecutor's view having been excluded, there was no need for a response.

196 F.2d at 581. (Emphasis Supplied)

Unlike Collazo, not only did the trial court permit the introduction of the FALN evidence, it also charged the jury that it could consider the statements on the element of willfulness (Tr. 80) even though it had ruled that the statements were being admitted on the issue of motive (Tr. 30), a question that, unlike Collazo, had not even been placed in issue.

Since the FALN evidence was immaterial, its admission was error.

POINT II

THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL. THE STRIKING OF AGENT LOMETTI'S TESTIMONY WAS INSUFFICIENT PROTECTION.

Following the testimony of Agent Lometti that he had chosen Appellant's voice from a "voice lineup" tape, the Government was unable to play the tape for the jury as requested by Appellant (Tr. 19). The trial judge then instructed the jury as to the "provisional" admissibility of Lometti's testimony (Tr. 24-25). Appellant had objected to this procedure (Tr. 23).

On the following day the prosecution informed the Court that the "voice lineup" tape had been destroyed (Tr. 47). The Court granted Appellant's motion to strike the entirety of Agent Lometti's testimony but denied Appellant's motion for a mistrial (Tr. 48).

As the trial court knew and indeed as it charged the jury,

> One of the most important issues in this case ... is the identification of the defendant ... you have heard tapes as proof on this issue. There is no other proof on this issue.
> (Tr. 81)

While it is generally true that a conviction will not be reversed based upon a trial court's refusal to grant a mistrial unless it is shown that the refusal to grant the motion

was a clear abuse of discretion resulting in substantial prejudice to the accused, [8] in this short trial, where identification was the crucial issue, lengthy exposure to Lometti's testimony without even the balancing of cross-examination, cf. United States v. Woods, 518 F.2d 696 (8th Cir. 1975), was clearly prejudicial. It is too much to suspect that the jury could disregard the only live identification testimony in the entire case. Compare, United States v. Chitwood, 457 F.2d 676, 679 (6th Cir. 1972). Scholarly authority supports this assumption.

> [E]vidence of identification, however, untrustworthy, is taken by the average juryman as absolute proof.
> Wall, Eye-Witness Identification in Criminal Cases (Thomas, New York) 19.

Appellant did not testify. The jury heard his voice only on exemplar and a composite tape (Tr. 56). Under these circumstances it simply cannot be said beyond a doubt that the jury was able to disregard Lometti's testimony.

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[8] See generally, United States v. Marshall, 458 F.2d 446 (2d Cir. 1972); United States v. Kompinski, 373 F.2d 429 (2d Cir. 1967); United States v. Chitwood, 457 F.2d 676, 679 (6th Cir. 1972).

POINT III

THE DISTRICT COURT ERRED IN CHARGING THE JURY ON THE VOLUNTARINESS OF APPELLANT'S STATEMENTS.

In the course of its charge, the Court informed the jury,

> Before being questioned by Government representatives, according to the Government witness, the defendant was read, and in writing acknowledged having received a statement of his legal rights. That was what he was entitled to. The Government was not also obligated to obtain a signed waiver. That was optional with the defendant. There was no evidence that the defendant refused to waive his rights. The testimony indicated that he declined to also sign a waiver. No evidence indicates that his statements to the agents were not voluntarily given and made at the interview. The jury may consider the alleged statements of the defendant, if it believes that they were made on the interview, as part of the circumstances bearing on his alleged motive and intent.
> (Tr. 81-82)

Defense counsel objected since at no time had he suggested to the jury that Appellant's statement was involuntary.[9/] Rather, as counsel stated, "I did not raise voluntariness but used his [Agent Warfield's] methodology merely to show the agent's motive in what he did." (Tr. 84) In his summation, defense counsel indicated to the jury that while Agent Warfield may have had a legal right to question Appellant (Tr. 65), the

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9/ A pre-trial motion to suppress Appellant's statements was denied.

jury should consider the agent's tactics in questioning him as indicative of his motive to testify against Appellant at trial, solely because Appellant may have been sympathetic to the FALN (Tr. 66).

Thus by misconceiving the thrust of defense counsel's attack on Agent Warfield's interrogation, the trial Judge issued a gratuitous charge to the jury on the voluntariness of Appellant's statements. This underscored the importance of these statements and portrayed them with a significance implying that defense counsel had attempted to impart to the jury that Appellant believed he had been damaged by his own admissions. Indeed, when the inappropriateness of the Court's charge was pointed out, the Court remarked,

> The Court: I thought during the trial by the form and innuendos of your questions that you were clearly raising that issue. At all events, I have so charged and at this moment there will be no point to suggesting to the jury that they erase my charge from their minds.
> (Tr. 84)

It would have been an easy task in this short trial to reinstruct the jury. The Court recalled the jury for additional charging on a separate issue.

On the facts of this case, it cannot be said that Appellant was not prejudiced, requiring reversal.

CONCLUSION

FOR ALL THE AFORESTATED REASONS, CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

Respectfully submitted,

Frederick H. Cohn

Frederick H. Cohn, Esq.
Attorney for Def. Appellant Valle

ADDENDUM

RJC:cr

Voice of Police Officer	Questioned Voice
This tape is being reproduced by Police Officer Mario A. Buda, Shield Number 5030, of the Communications Division Tape Room, on October 15, 1975, at 13:00 hours. The following is a reproduction of master tape 1-43 of ACD position 24, Telephone Company position 14, over channel 15, turret 12. Originally transcribed starting at 12 hour, 2 minutes and 54 seconds and concluding at 12 hour 5 minutes and 7 seconds on August 17, 1975.	
(static on tape) . . . Police emergency 458. May I help you?	
	Ah, There is a guy around where I live and his name is Carlos Valle (V A L L E) who want to kill the President of the United States and blow up Federal Buildings.
He wants to kill the President and blow up Federal buildings?	
	Right. He's a member of the Communist Party. He live 1115 FDR Drive.
What is his address? 1115 FDR Drive?	1115 FDR Drive.
	Apartment 10F. He want to kill the President and something about blowing up Federal Buildings and he very dangerous.
His name is Carlos Valle (V A L L E)?	
	About 24 or 25 years old.

(Continued on page 2)

And he lives in Apartment 10F?

Right.

Is that on the 10th floor?

10th floor; right.

Ahh, and he is a member of the Communist Party? Huh?

Right.

And you say he wants to or he has said he is going to kill the President?

Ah, he has said.

He said he is going to kill the President?

Right

And blow up Federal buildings?

Right.

Here or in Washington? The buildings?

Ah, he didn't explain ..... whether it was here or whether it was in New York. He say any Federal buildings.

Alright. That is 1115 Roosevelt Drive?

Right

Apartment 10F and his name is Carlos Valle

Right.
About 24 or 25 years old.

And he is a member of the Communist Party

Right. That is what he said anyone over there

And he said he is going to kill the President of the United States and blow up Federal buildings.

Right

Okay. Do you know if he has any explosives or anything.

Ah. I don't know because he didn't tell. He only talk about, against the Government. I don't say what he have or he don't have.

Don't you know if he has a gun?

Ah. He didn't tell no, you know he don't tell in the open, you know.

Alrigh., 1115 Roosevelt Drive. That's between East 10th Street and Reiss Houses. Right?

Right.

He lives in the Reiss Houses.

Reiss Houses. Okay. Fine.

Okay.

Thank you. This reproduction is now complete, Police Officer Mario A. Buda.